

[Waiver 1996-5]

May 31, 1996

Honorable Derick P. Berlage
[Address withheld]

Dear Councilmember Berlage:

The Ethics Commission has considered your letters of March 15, 1996 and May 11, 1996 in which you request either a waiver of the prohibitions of Section 411 of the Montgomery County Charter or our advice that those prohibitions do not apply to your activities as a private, part-time attorney. In your March letter, you discuss your plans to develop a contractual relationship with attorneys who may be engaged in litigation against the County. You would not perform any work for clients engaged in litigation against the County but would be working on a contractual basis with attorneys engaged in such litigation. In your May letter, you have also sought advice regarding whether you may represent a client who works for an organization that receives some funding from the County. You would not be representing the client's employer. Instead, you would be representing the individual in a personal injury matter that has no connection with Montgomery County Government or the client's employer.

Request to Serve as a Contract Attorney

As you know, Section 411 of the Montgomery County Charter provides that:

No person whose compensation is paid in whole or in part by the County shall (1) act as an attorney . . . or receive compensation or anything of value from any person, firm or corporation . . . engaging in litigation against the County, or any instrumentality thereof . . .

Since you will receive compensation from law firms that are engaging in litigation against the County, a waiver of Section 411 is advisable. A broad interpretation of Section 411 would require a waiver. Your contractual relationship with these law firms creates an indirect connection between your legal practice and the representation by those firms of clients engaged in litigation against the County.

Previously, the Commission has granted waivers to attorneys who were not personally involved in litigation against the County but who worked for law firms that were suing the County. Your relationship with such litigation will be even more attenuated because you will not be an employee of the law firms. As a result, you will presumably be able to control which cases you handle and will be able to distance yourself from any actions involving the County. Furthermore you will not be a "shareholder" who receives a percentage of the revenues associated with litigation against the County. Instead, your income will be directly related to your cases.

The Commission has concluded that a waiver is clearly warranted in your case. The applicable waiver standard is set forth in Article 19A-8(a). The Commission found

that all three requirements were satisfied in this case. The best interests of the County are served by the granting of your waiver request. The County benefits from the retention of qualified and experienced councilmembers who decide to supplement their government salaries or to expand their professional experiences. The County also benefits from councilmembers who possess legal training and skills. Denial of the waiver request would impair the ability of the County to attract and retain such qualified public servants. The importance to the County of your services as a Councilmember clearly outweighs the potential harm of any conflict of interest. There is little or no likelihood of any conflict because you will not be personally involved in any litigation against the County. Furthermore, the granting of the waiver will not give you an unfair advantage over other members of the public. In your request, you do not seek to represent clients before the Council or other County agencies. Such activities would require further consideration.

In light of the facts presented in your letters, the Commission unanimously concluded that a waiver was appropriate. You may work as a contract attorney for law firms that represent clients in litigation against the County. You will not need any additional waivers in order to affiliate with such firms unless you wish to participate directly in a lawsuit against the County.

Request to Represent Director of Not-For-Profit

The Commission has also reviewed the request in your May letter. Section 411 is relevant to that request as well because the not-for-profit organization transacts business with the County. Section 411 prohibits an attorney from receiving compensation “from a person, firm or corporation transacting business of any kind with . . . the County.” Recently, this provision in the Charter has been the subject of discussion due to its considerable breadth. To date, the Commission has interpreted the phrase literally and, where appropriate, granted waivers. To the extent that Section 411 applies to your representation of the director of the not-for-profit organization, the Commission has decided to issue a waiver authorizing such representation.

The Commission found that all three criteria for a waiver have been satisfied. For the reasons previously stated, the best interests of the County are served by granting of the waiver. Significantly, you would be representing the director of the organization, not the organization that actually contracts with the County. Furthermore, the litigation does not involve the County or the not-for-profit organization. In light of these facts, there is little potential harm of any conflict of interest. Finally, granting the waiver will not give you any unfair advantage over members of the public.

The Commission is also granting a waiver of Article 19A-12(b) which prohibits a public employee from being employed by a business that is regulated by or contracts with the County agency with which the public employee is affiliated. Since the not-for-profit contracts with the County, it is prudent for you to obtain a waiver of this provision as well. Article 19A-8(b) defines the appropriate standard. In this case, subpart (3) has been met because the proposed employment is not likely to create an actual conflict of interest.

Your request does not require the Commission to address Article 19A-11 regarding conflicts of interest. However, the Commission would recommend that you disclose your legal representation of the director if the County Council is confronted with funding or other issues directly affecting the not-for-profit.

I hope this response addresses all of your concerns. The Commission refrains from granting blanket waivers because each factual situation presents unique considerations. At this time, the Commission is not prepared to issue an advisory opinion that offers more general advice regarding additional categories of permissible conduct. If you have any additional questions, please feel free to contact the Commission. Your sensitivity to these issues is greatly appreciated.

Sincerely,
[signed]
Laurie B. Horvitz
Chair